

Attachment Three

United States Senate
WASHINGTON, DC 20510
IMPEACHMENT TRIAL COMMITTEE

DISPOSITION OF PRETRIAL ISSUES

Upon consideration of the written submissions of the parties on pretrial issues and the oral argument on April 12, 1989, the committee has authorized the chair to issue the following rulings on behalf of the committee:

Preliminary Witness Lists

First, on three occasions, beginning on August 10, 1988, the Committee on Rules and Administration asked the parties for preliminary lists of witnesses with a description of the general nature of the testimony that is expected from each witness. The Rules Committee expressly stated that neither side would be precluded, by the submission of this preliminary information, from requesting subpoenas for other witnesses. On September 6, 1988, the House submitted a list of twenty-three witnesses that it anticipates calling. The House briefly described the nature of each witness's proposed testimony. On January 17, 1989, the House supplemented that list with six additional witnesses. Judge Hastings did not provide to the Rules Committee a list of his proposed witnesses in these Senate proceedings. Neither has Judge Hastings provided to this committee a preliminary list of the witnesses that he intends to call before us, other than to refer to material which he had provided last year to a subcommittee of the House Committee on the Judiciary.

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It is imperative that Judge Hastings now provide his preliminary witness list without any further delay. The committee requires the list in order to complete its consideration of pretrial issues, including the fixing of an appropriate date to begin evidentiary hearings. Accordingly, Judge Hastings is directed to provide to the committee by noon on April 19, 1989, a preliminary witness list that identifies in good faith the witnesses that he intends to call before this committee. The witness list should also briefly state, in detail comparable to that already provided by the House for its anticipated witnesses, the nature of the testimony that Judge Hastings expects each listed witness would provide. This is to be a preliminary list. Judge Hastings may add, by showing good cause for not including them on the preliminary list, additional names when he submits his final witness list. In the absence of a showing of good cause, the committee may exclude the testimony of any witness who is not listed and described in the preliminary witness list.

The House has indicated that it may have additional witnesses. To the extent that those additional witnesses are now known to the House, the House should supplement its preliminary list by noon on April 19, 1989.

Motion In Limine

Second, the House has moved in limine to exclude five categories of evidence as irrelevant.

The first category concerns the motivations of persons who investigated Judge Hastings in 1961 and then who prosecuted him in United States v. Hastings, Cr. No. 81-596-Cr-ETG. The third category concerns the motivations of persons who investigated the matters addressed by Grand Jury No. 86-3 (Miami) concerning the alleged disclosure by Judge Hastings of confidential wiretap information.

Judge Hastings correctly notes that the House has placed on its witness list several assistant United States attorneys and agents of the Federal Bureau of Investigation who would testify in connection with either the bribery and perjury allegations or the wiretap matter. Judge Hastings asserts that the House motion is premature. He also asserts that he should be able to inquire into the motivation and bias of the witnesses against him. As Judge Hastings has asserted a tenable basis for some degree of latitude in cross-examining the witnesses that the House will call, the committee denies at this time this portion of the House's motion. To the extent that Judge Hastings proposes to inquire into the motivations of persons who investigated and prosecuted him for a purpose other than impeaching witnesses that the House will call, the House motion is premature in

the absence of a firm indication from Judge Hastings, through the filing of a witness list, that he intends to call any such witnesses. We wish to make clear nonetheless that our denial at this time of this portion of the House motion should not be understood to invite an open-ended inquiry into the motivations of Federal prosecutors and investigators. Rather, any such inquiry must be limited to evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Hastings' guilt or innocence.

Categories two and four concern the motivations of persons who initiated, investigated, and considered the complaints that were filed against Judge Hastings in March, 1983, and September, 1986, with the Eleventh Circuit under the Judicial Conduct and Disability Act of 1980. Judge Hastings contends that this aspect of the House motion also is premature.

The issues that are presented by the articles concern Judge Hastings' conduct, not the conduct of members of the judicial branch or persons employed by it. Judge Hastings has made no showing that evidence in categories two and four would be relevant to the articles of impeachment. Moreover, a grant of the House motion with respect to categories two and four should help to focus the parties' preparation for trial on issues that will be germane to the Senate's consideration of the articles. The motion to exclude

evidence of the matters described in categories two and four is granted.

The fifth category in the House motion in limine is cumulative evidence on Judge Hastings' general character and reputation. We agree with Judge Hastings that this portion of the House motion in limine is premature. We expect that Judge Hastings will be mindful of the limitations that the committee placed on the number of character witnesses, and the total length of character testimony, in the Claiborne proceedings, and that, in composing his witness list, Judge Hastings will recognize the need to avoid cumulative evidence. We can address at a later date any question which arises about the need to impose limits on that testimony.

Documentary Discovery

Third, Judge Hastings has moved for extensive pretrial discovery. He advocates that discovery be based on contemporary ideas about discovery in federal civil judicial proceedings. The House has proposed a scope of discovery that is modeled to a greater extent on federal criminal judicial proceedings. The House proposes to provide to Judge Hastings any exculpatory evidence that it possesses. The House also proposes that each party provide to the other party the documents that it proposes to offer in evidence, prior sworn, adopted, or approved statements of witnesses that each proposes to call, and substantially verbatim and

contemporaneously recorded statements of witnesses that each intends to call. The discovery proposed by the House should be completed as promptly as possible. We reject, however, the divergent theoretical limits -- expansive in Judge Hastings' view and constricted in the House's view -- that each side has advocated.

The House has expressed a concern about one House of Congress directing another House to produce records. We need not address at this time whether the Senate has that power in an impeachment proceeding, because we think that it should be sufficient to state principles and a schedule to guide these proceedings:

(a) To the extent that the parties have had a disagreement about photocopying, we recommend to the House that the issue be resolved in Judge Hastings' favor and that the House provide to Judge Hastings copies of all documents that the House has no objection to providing on the basis of their content. To facilitate Judge Hastings' response to the House's proposed stipulations, a matter that will be discussed below, the House should provide those copies by April 21, 1989, a week from today's order.

(b) The House -- which has proposed to provide exculpatory materials, certain prior statements of witnesses, and documents and other tangible evidence that it intends to introduce in evidence -- has indicated that it has provided

most but not all of that material to Judge Hastings. The House would like to defer further production until it receives equivalent material from Judge Hastings. We will be requiring comparable disclosure by Judge Hastings, but the production to Judge Hastings should not be delayed while that occurs. Again, because we will be requiring responses to the House's proposed stipulations, the House should provide this material to Judge Hastings by April 21.

(c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House -- for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings -- to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to

Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprized of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them. Again, because of the schedule that will be set forth below for responses to stipulations, the House should respond by May 3.

(d) Judge Hastings also has a burden that he has not yet met. It will be necessary for him to do more than simply demand everything that other people have. In order to facilitate the process that we are asking the House and the other branches to undertake, Judge Hastings should identify, with far greater particularity than he has to date, the records that are germane to issues in these proceedings. Also, if it would be of assistance to the holders of documents in determining their responses, he should articulate to them the basis for his requests. To enable the House to respond by May 3, Judge Hastings should submit his particularized requests by April 26.

(e) Neither the Department of Justice nor the counsel or the members of the Investigating Committee of the Judicial Council of the Eleventh Circuit are before us. If Judge Hastings has requests for documents from either the Department, including the Federal Bureau of Investigations, or the Judicial Council, he should promptly make particularized requests to them by April 26. With knowledge of the committee's interest in the fullest disclosure possible, we would appreciate knowing of the Department's and the Council's responses at the earliest possible time.

(f) Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements of witnesses that Judge Hastings intends to call.

Depositions

Fourth, Judge Hastings has asked that the Senate utilize its subpoena power to enable him to take depositions in advance of the committee's hearings. He has attached to his most recent request a list, which he has denominated a provisional list, of twenty-four Department of Justice attorneys and Federal Bureau of Investigation officials and agents. The list is taken from a list of provisional witnesses that Judge Hastings had submitted last year to a subcommittee of the House Committee on the Judiciary.

The committee knows of no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial. Nevertheless, the committee will give further consideration to Judge Hastings' request for depositions after receiving from him a statement that includes the following information: a list of proposed deponents; a proffer of the testimony he expects to elicit from each proposed deponent and the relevance of that testimony; whether the proposed deponent has testified or provided statements in prior proceedings and whether Judge Hastings has received or has had access to any transcripts or recorded statements; whether Judge Hastings has asked the proposed deponent to provide information voluntarily and, if he has, the response of the proposed deponent; and, if the committee provides for depositions but limits their number, what priorities Judge Hastings places among the depositions that he is requesting.

If Judge Hastings wishes to pursue his request for depositions, he should submit this statement by April 28, 1989.

It is the committee's hope and expectation that if either the House or Judge Hastings seeks an opportunity to obtain information from the Department of Justice, including the Federal Bureau of Information, that the Department and the Bureau will cooperate voluntarily to provide relevant information.

Stipulations

Fifth, the House, on December 15, 1988, served an original and, on March 31, 1989, served a revised proposed stipulation of facts. The revised proposal reorganizes the original proposed stipulation of facts into fifteen categories. The House also served on December 15, 1988, a proposed stipulation of documents which asked that the parties stipulate that each of the listed documents is genuine. The proposed documentary stipulation also proposed other stipulations for designated categories of documents. The December 15, 1988 submission by the House on documentary stipulations stated the proposed stipulations did not preclude pertinent objections to the admissibility of the documents listed by the House based on matters not addressed in the stipulations.

On January 17, 1989, the House proposed that the Senate adopt a rule that any proposed stipulation of fact will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. The House asked for a parallel rule on the authenticity of documents.

An early resolution of factual questions and questions about the authenticity and admissibility of documents that are not in dispute will enable the parties and the committee to focus their time and energies on matters that are truly in

disagreement. Also, the committee has been directed by the Senate to report to it on facts that are uncontested.

Accordingly, the committee accepts the House proposals. We direct Judge Hastings to respond to the House's proposed revised stipulations of fact, filed on March 31, 1989, by admitting their truth or serving and filing a specific objection that includes a proffer as to why the proposed stipulation should not be taken as true. With respect to documents, we direct Judge Hastings to respond to the House's proposed documentary stipulations, filed December 15, 1988, by admitting the matters set forth in that submission and by admitting the admissibility of the documents listed by the House, or by serving and filing a specific objection that includes a proffer as to why the proposed stipulation concerning each document should not be taken as true and the particular document admitted into evidence.

Judge Hastings has had nearly four months to evaluate the House's proposed stipulations. We direct that Judge Hastings' response be submitted no later than May 10, 1989. This should be a reciprocal process. Although Judge Hastings' has not proposed stipulations of his own, he may do so by May 10. If Judge Hastings does submit proposed stipulations by that day, the House should respond to them by May 24. The parties should engage in this process with an

eye towards resolving problems. Consequently, if a disagreement about a proposed stipulation can be resolved by redrafting the stipulation to be more accurate, or can be resolved by providing access to a specific document, then we would expect the parties to work together to settle differences between them.

Evidentiary Principles

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee's task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.

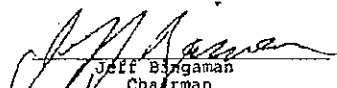
Final Pretrial Statements

Lastly, the parties should file final pretrial statements by a date that the committee will designate when it issues an order setting a date for the commencement of testimony. These statements should include a final list of

witnesses with a brief statement of the nature of each witness's proposed testimony. The parties should also submit marked exhibits that each proposes to offer. Further, each party should set forth to the committee the legal principles that each believes is applicable to each article of impeachment, or, if appropriately grouped, set of articles. Although the committee will not reach conclusions of law, it is important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding. We will provide more detailed instructions to the parties about the contents of these pretrial statements.

Deferred Matters

The committee is continuing to consider Judge Hastings' application for defense funds. The committee is also continuing to consider a schedule for its evidentiary hearings. The committee expects to issue an order or orders on these matters within a week.


Jeff Bingaman
Chairman

Dated: April 14, 1989